Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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STAFF SERGEANT MICHAEL R. LORENZEN,
PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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**Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

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## PETITION FOR WRIT OF CERTIORARI

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Douglas H. Kohrt
Colonel, United States Air Force
Appellate Defense Division
*Counsel of Record*

Tishlyn Estelle Taylor
Captain, United States Air Force
Appellate Defense Division
*Counsel for the Petitioner*

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332–8000
202–767–1562

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it found (1) that the petitioner had not overcome the presumption of competence in showing this his trial defense counsel was ineffective; and (2) that the sentence in this case was not substantially affected by the presence of unlawful command influence.

## TABLE OF CONTENTS

*Page*

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

REASON FOR GRANTING THE WRIT ..... 2

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FOUND (1) THAT THE PETITIONER HAD NOT OVERCOME THE PRESUMPTION OF COMPETENCE IN SHOWING THIS HIS TRIAL DEFENSE COUNSEL WAS INEFFECTIVE; AND (2) THAT THE SENTENCE IN THIS CASE WAS NOT SUBSTANTIALLY AFFECTED BY THE PRESENCE OF UNLAWFUL COMMAND INFLUENCE

CONCLUSION ..... 20

APPENDIX A (Opinion of the United States Court of Appeals for the Armed Forces) ..... 1a

APPENDIX B (Opinion of the United States Air Force Court of Criminal Appeals) ..... 17a

## TABLE OF AUTHORITIES

*Page*

**Supreme Court Cases:**

*Penson v. Ohio*, 488 U.S. 75 (1988) .....12

*Strickland v. Washington*, 466 U.S. 668 (1984) ..2, 3, 12

**Military Cases:**

*United States v. Campos*, 42 M.J. 353 (1995) .....15

*United States v. Carlson*, 21 M.J. 847 (A.C.M.R. 1986) .....17

*United States Navy-Marine Corps Court of Military Review* v. Carlucci, 26 M.J. 328 (C.M.A. 1988) .....16

*United States v. Charles*, 15 M.J. 509 (A.F.C.M.R. 1982) .....16

*United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987) .....7

*United States v. Gagnon*, 15 M.J. 1037 (N.M.C.M.R. 1991) .....11

*United States v. Guerrero*, 25 M.J. 829 (A.C.M.R. 1986) .....7

*United States v. Kelly*, 32 M.J. 813 (N.M.C.M.R. 1991) .....11

*United States v. King*, 13 M.J. 863 (N.M.C.M.R. 1982) .....11

*United States v. Lawson*, 33 M.J. 946 (N.M.C.M.R. 1991) .....20

*United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) .....14

*United States v. Lowery*, 18 M.J. 695 (A.F.C.M.R. 1984) .....16

*United States v. Morris*, 28 M.J. 8 (C.M.A. 1989) .....16

*United States v. Moses*, 26 M.J. 980 (A.F.C.M.R. 1988) .....7

*United States v. Murray*, 42 M.J. 174 (1995) .....14

*United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977) . . .11

*United States v. Polk*, 32 M.J. 150 (C.M.A. 1991) . . . .11

*United States v. Rivas*, 3 M.J. 282 (C.M.A. 1979) . . . . .7

*United States v. Schroeder*, 17 M.J. 792 (A.C.M.R. 1984) .....16

*United States v. Scott*, 21 M.J. 889 (N.M.C.M.R. 1986) .....12

*United States v. Scott*, 24 M.J. 186 (C.M.A. 1987) .....2, 7, 11

*United States v. Serino*, 24 M.J. 848 (A.F.C.M.R. 1987) .....16

*United States v. Singleton*, 41 M.J. 200 (C.M.A. 1994) .....15, 19

*United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994) .....16

*United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954) .....20

*United States v. Thomas*, 22 M.J. 388
(C.M.A. 1986) .....15, 16, 19

*United States v. Treakle*, 18 M.J. 646
(A.C.M.R. 1984) .....16, 17

*United States v. Tucker*, 20 M.J. 863
(A.F.C.M.R. 1985) .....16

*United States v. Washington*, 42 M.J. 547
(A.F. Ct. Crim. App. 1995) .....16

**Federal Statutes:**

28 U.S.C.A. § 1259(3) (West Supp. 1996) .....1

10 U.S.C.A. § 867a (West Supp. 1996) .....1

Article 27(b), U.C.M.J. (10 U.S.C. § 827) .....2

Article 37, U.C.M.J. (10 U.S.C. § 837) .....15

Article 46, U.C.M.J. (10 U.S.C. § 847) .....16

**Constitutional Provisions:**

U.S. Constitution Amendment VI .....1, 2, 16

**Other Authorities**

*Lane's Goldenstein Trial Technique*,
section 10.01 (3d edition 1991) .....4

The petitioner, Staff Sergeant Michael R. Lorenzen, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in this case on 3 September 1997.

## OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces is not yet reported in an advance sheet or the Military Justice Reporter. The decision, No. 96-1036, __ M.J. __ (3 September 1997), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, ACM 31292 (A.F. Ct. Crim. App., 29 April 1996), is located at Appendix B.

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 3 September 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867 (a) (West Supp. 1996).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the Constitution of the United States provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

## STATEMENT OF THE CASE

At the petitioner's general court-martial, he was convicted contrary to his pleas of larceny, in violation of Article 121, Uniform Code of Military Justice (10 U.S.C. § 921), and writing bad checks, in violation of article 123a, Uniform Code of Military Justice (10 U.S.C. § 923a).

Petitioner was sentenced to a bad conduct discharge, 5 years confinement, forfeitures of $330 pay per month for five years, and reduction to the rank of airman basic.

On appeal, both the Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces held the trial defense counsel's performance did not fall below the standard of competence envisioned by this Honorable Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Likewise, both of the lower Courts held that the Government had rebutted the presumption of prejudice arising from any unlawful command influence in the proceedings under Article 15, Uniform Code of Military Justice (10 USC § 815).

## REASON FOR GRANTING THE WRIT

### THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FOUND (1) THAT THE PETITIONER HAD NOT OVERCOME THE PRESUMPTION OF COMPETENCE IN SHOWING THIS HIS TRIAL DEFENSE COUNSEL WAS INEFFECTIVE; AND (2) THAT THE SENTENCE IN THIS CASE WAS NOT SUBSTANTIALLY AFFECTED BY THE PRESENCE OF UNLAWFUL COMMAND INFLUENCE

THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN THIS CASE.

Under the Sixth Amendment of the United States Constitution, and Article 27(b), U.C.M.J. (10 U.S.C. § 827), an accused has a right to the "effective assistance of counsel." *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). The two part test to determine whether an individual has been

denied the effective assistance of counsel was set out by this Honorable Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, an appellant must identify acts or omissions by his or her attorney, and bear the burden of persuading the court that those acts or omissions "were outside the range of professional competent assistance." *Id.* at 689. Second, an appellant must also show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" was defined as a "probability sufficient to undermine confidence in the outcome." *Id.* at 694. This Honorable Court noted that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. It is submitted that trial defense counsel's failure to actively and effectively challenge and contest the prosecution's case and evidence, his failure to make the necessary and required arguments, motion, and objections, and his failure to cross-examine witnesses and to present highly relevant and material evidence which was readily available to him which would have raised at least reasonable doubt about petitioner's guilt does not measure up to the requisite degree of competence demanded by this Honorable Court and the Sixth Amendment. Further, there is a reasonable probability that if these errors had not occurred, the outcome of the trial would have been different.

This was a case of a technical sergeant (who had just recently been reduced to staff sergeant) with nearly seventeen (17) years of credible service. He had been charged with a number of offenses which directly challenged his personal integrity as well as his professional career. Despite the fact that petitioner was at risk of losing virtually everything that was important to him, his trial defense counsel simply did not

demonstrate the incentive, motivation, or actions which were necessary and required to afford effective assistance of counsel to his erstwhile client. Throughout the entire duration of the court-martial, from beginning to end, trial defense counsel did not take those actions which were and are required to be taken by competent counsel.

To begin with, trial defense counsel declined to make an opening statement in this case. An attorney must do everything is his power, and invoke every opportunity, to advance his client's position and to make it persuasive. Every legal publication and seminar on trial advocacy stresses the importance of an effective opening statement so the jury (or the court) can be informed about what issues will be raised and the respective positions of each side. It has been written that:

> The jury will never be more receptive to an attorney's presentation than when she gets up to make an opening statement. They have sat through perhaps hours of sometimes boring, repetitious questioning during jury selection. At last, they are going to hear what the case is really all about—and they are going to see lawyers "going at it." Their interest is at a peak.

*Lane's Goldenstein Trial Technique*, section 10.01 (3d edition 1991).

However, in this instance, the members did not hear what the case was all about or see the lawyers "going at it" because trial defense counsel did not make any opening statement at all. Rather than making an opening statement immediately after the trial counsel made his, trial defense counsel elected to reserve his opening (R. 92). This is not an uncommon tactic, and would not support a claim of ineffectiveness of counsel by itself. However, trial defense counsel also failed

to make an opening statement at any later time. Thus the petitioner was deprived of any opportunity to explain his position and case to the members before the prosecution presented their entire case; or, in fact, until all of the evidence had been presented and counsel made closing arguments. It is submitted that any competent counsel would have, and should have, made an opening statement to express the defense position to the members before any evidence had been presented.

Not only did trial defense counsel fail to make an opening statement, he also failed to make a motion to dismiss when the prosecution failed to present the required evidence to meet the elements of specifications 3 and 4 of charge I in their case-in-chief. The government presented no evidence that these particular gas masks or sleeping bags were actually military property, or were ever owned by the military. There was no evidence of an inventory which showed that these particular items belonged to, or had been taken from, a particular unit. In fact, no one had even reported any items being missing. There was no evidence of any government serial numbers, or that these items could not be obtained through sporting goods stores or military surplus providers. It is common knowledge that items of this type can be purchased and obtained in any number of legitimate ways. In the absence of any evidence that these particular items belonged to, and were taken from, a military unit, the prosecution did not meet their burden of proof on an essential element of this offense. As such, a motion for a finding of not guilty should have been made. However, trial defense counsel did not hold the prosecution to their burden of proof, and did not make any such motion. Having been found guilty of these two specifications, the prejudice to petitioner as a result of the failure to make this motion was direct and substantial.

The trial defense counsel also allowed the prosecution to offer forty-three (43) exhibits into evidence without making any objections. Included in these exhibits are numerous documents which were wholly inadmissible under the Military Rules of Evidence. The prosecution did not lay the foundation for many of these exhibits, or provide any form of authentication. Many of these exhibits also contained blatant hearsay by individuals who were not called to testify; and there was no apparent hearsay exception for this evidence. However, there was no objection to any of these exhibits. In fact, the record goes on for several pages where the trial defense counsel repeatedly and consistently stated "no objection" as each of these exhibits were offered seriatim (R. 13–27). Legitimate objections were available and should have been made not only to prevent this inadmissible hearsay from being presented to the members, but also to protect the record for the petitioner.

Not only were necessary objections not made to documentary evidence, they also were not made to improper testimony. For example, trial defense counsel did not object when a witness was asked to relate hearsay from a report to the effect that petitioner had an opportunity to take certain items three years earlier. However, the witness had absolutely no personal knowledge concerning the preparation of the report, the contents of the report, or the report's accuracy or completeness. (R. 191–192). This testimony would not have been permitted if the appropriate objection had been made. It also cannot be doubted that this testimony prejudiced the petitioner in that he was found guilty of stealing this property (Specification 5 of Charge I), and there was no other evidence of any alleged theft three years earlier.

Additionally, trial defense counsel did not object to other improper evidence and arguments presented by the trial counsel. Several times trial counsel presented evidence, and

expressly argued, that petitioner stole a master key which opened every office in the unit, including the office of the Wing Commander (R. 89, 191, 304). The fact that this key opened the office of the wing commander, or any other commander, was not relevant to whether of not the petitioner stole the key. Such evidence and argument was a blatant attempt to invoke and inject emotion and passion on the part of the members into the court-martial deliberative process. However, trial defense counsel did not make any objection.

It has been recognized that counsel are reasonably and legitimately expected to recognize legal issues, to raise these issues at trial, and to make appropriate objections. *See United States v. Rivas*, 3 M.J. 282, 286 (C.M.A. 1979); *United States v. Cruz*, 25 M.J. 326, 330 (C.M.A. 1987); *United States v. Scott, supra; United States v. Moses*, 26 M.J. 980, 983 (A.F.C.M.R. 1988); *United States v. Guerrero*, 25 M.J. 829, 830 (A.C.M.R. 1986), *affirmed*, 28 M.J. 223 (C.M.A. 1989). The failure to make the above arguments, motion, and objections constitutes an unreasonable and unwarranted departure from the standard of performance required of competent counsel. A requirement to raise certain issues or make certain motions or objections under the doctrine of waiver imposes a corresponding responsibility on the defense bar. *See United States v. Guerrero*, 25 M.J. at 831. Such a responsibility to raise and preserve appropriate legal issues is part of the minimum standard of conduct which is reasonably required of, and expected from, criminal defense attorneys. Accordingly, when that standard of conduct is not met, the counsel's performance must be deemed to be deficient.

Not only did trial defense counsel fail to make the necessary objections, motion, and arguments on behalf of his client, he failed to put forward a defense case by not cross-examining a number of key prosecution witnesses and not presenting defense evidence which was readily available.

Trial defense counsel entirely failed to cross-examine seven different prosecution witnesses, and questioned several others in the most perfunctory manner (R. 206, 211, 214, 219, 224, 249, 269, 100–101, 119–120). These witnesses were crucial links in the prosecution's case, and their testimony was damaging to the petitioner. Certainly there were points to make which would have supported the petitioner's innocence of these charges, or at least have "poked holes" in the prosecution's case.

As an example of how a vigorous cross-examination could have materially assisted the petitioner' case, the testimony of Mr. Martin must be considered. Mr. Martin was the Chief of the Defense Reutilization Marketing Office (DRMO), and he was called to testify that he had never sold any base station radios to the petitioner of the type alleged in the charges and specifications (R. 205–206). However, the truth of the matter was that petitioner had purchased base station radios from DRMO. Defense Appellate Exhibit A conclusively shows that petitioner purchased a base station radio from DRMO for $30.00. Further, the petitioner clearly indicated in the recorded conversations that the radios he was talking about had been purchased from DRMO for less than $100.00, that the he had a receipt, and that they had been in storage along with some other gear for some period of time before the other radios were ever stolen. (Pros. Ex. 8–10). However, the members were never even made aware of the possibility that the petitioner was speaking in the recorded conversations about radios he had purchased from DRMO, and not the ones which were charged. The prosecution's evidence on this specification consisted of the testimony of a convicted thief and recorded conversations where the petitioner discussed the sale of some radios. The documentation from DRMO could have been used to explain the recorded conversations. If this point had been explored on

cross-examination, and the documentation of this sale presented in evidence, it could have cast substantial doubt on petitioner's guilt as to Specification 1 of Charge I.

Another example of evidence which should have been presented by trial defense counsel with regard to Specification 1 of Charge I concerns petitioner's medical condition at the time these base station radios were taken. The evidence in the record reflects that the radios taken between 17–21 November 1993 were very large and bulky, and weighed over 100 pounds (R. 96–99, 112–113). However, at the time these radios were taken, petitioner was suffering from back and neck injuries sustained in a motor vehicle accident. The impact from another vehicle slamming into the front of petitioner's car was such that the petitioner's seat was broken and he was thrown into the back seat. Defense Appellate Exhibit B. This injury was sustained on 3 November 1993 and caused severe back pain which prevented petitioner from any heavy lifting until 9 May 1994. Defense Appellate Exhibit B. This information was contained in petitioner's official military health records and he was being treated on a regular basis by Captain Zdor-North of the 43rd Medical Group at Malmstrom AFB. Either the records or the testimony of Dr. Zdor-North could have been used to present information on the petitioner's injuries to the members.

The benefit to the defense from this information is obvious. The petitioner's physical condition rendered him incapable of lifting and carrying these heavy radios out of the hangar, and lifting them onto a truck to transport them off base as the government alleged. This not only made the possibility that petitioner stole the radios much less probable, but would have strengthened the argument that the radios petitioner was referring to in the recorded conversations were smaller radios he purchased from DRMO. This evidence could have had a substantial impact on the members

deliberations. Further, this evidence was officially documented, could not have been rebutted by the prosecution, and there was no reason not to present it.

Another example of how trial defense counsel allowed incorrect, inaccurate, and misleading information to be presented to the members concerned petitioner's financial condition at the time the checks were written in December 1993. The prosecution alleged that petitioner had intentionally written checks with the intent to defraud the exchange. Petitioner's explanation to the exchange was that he had grabbed the wrong check book, and mistakenly written a check on an account he had closed. (R. 261–262). Defense Appellate Exhibit D are the bank statements for the petitioner's active account which show that the petitioner had a balance of over $1,000.00, more than twice the amount needed to cover the checks in question. This evidence would have directly supported the petitioner's explanation. However, trial defense counsel never offered this evidence on behalf of his client, even after members asked for this very information (R. 239). Not only did the members ask about this very point, but in argument the government counsel argued very specifically that the petitioner did not have enough money his account to pay these checks and that is why the checks were not paid until mid-February (R. 308). Trial defense counsel had the evidence available to provide accurate information to the members, and to prevent the clearly erroneous argument of government counsel, but never presented that evidence.

Not only did the trial defense counsel not attack or challenge the prosecution case, he compounded this error by utterly refusing to present his own case or any alternative explanation despite the fact that such evidence was available to him. Trial defense counsel did *not* call a single witness or offer a single piece of evidence on behalf of petitioner on the

merits. In fact, he did not even introduce any evidence through the prosecution witnesses as usually occurs. In short, trial defense counsel did virtually *nothing* on behalf of petitioner. He did *not* make an opening statement explaining his case to the members and asking them to accept petitioner's explanation; he did *not* make necessary objections and motions to prevent the prosecution from using inadmissible evidence; he chose *not* to cross-examine numerous prosecution witnesses or to correct inaccuracies and misperceptions which the prosecution advanced and argued; and he *failed to present* documentary and testimonial evidence which cleared up those misperceptions and which would have accurately related the true facts in a manner beneficial to petitioner.

When counsel undertake to represent an accused, they have an obligation to be prepared for trial and to render their best efforts on behalf of their client. Trial defense counsel are required to carefully investigate the facts and circumstances which give rise to the charges, to *marshal evidence favorable to an accused* and to give competent and informed advice. *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991); *United States v. Palenius*, 2 M.J. 86, 90 (C.M.A. 1977); *United States v. Scott, supra*, 24 M.J. at 188; *United States v. Kelly*, 32 M.J. 813, 821–824 (N.M.C.M.R. 1991). Furthermore, counsel have an obligation to present *all known and available evidence* which would be material to an issue before the court. *United States v. Gagnon*, 15 M.J. 1037 (N.M.C.M.R. 1983); *United States v. King*, 13 M.J. 863 (N.M.C.M.R. 1982). Counsel who do not present relevant and material evidence which is available simply are not acting as diligent and conscientious advocates on behalf of their client.

In the case *sub judice*, trial defense counsel elected to argue that petitioner did *not* commit these offenses and that

there was an innocent explanation. However, once this trial strategy was chosen, counsel was "required to make a reasonable effort to develop a supporting case, bringing 'to bear such skill and knowledge [and evidence] as will render the trial a reliable adversarial testing process.' " *United States v. Scott*, 21 M.J. 889, 893 (N.M.C.M.R. 1986) *affirmed*, 24 M.J. 186 (C.M.A. 1987), *citing*, *Strickland v. Washington, supra*, 466 U.S. at 688. The Supreme Court has recognized the "paramount importance of vigorous representation" in our adversarial system of justice which is "premised on the well-tested premise that truth—as well as fairness—Is 'best discovered by powerful statements on both sides of the question.' " *Penson v. Ohio*, 488 U.S. 75, 84 (1988)(citations omitted). Such a supporting case and "powerful statements on both sides of the question" were not adequately developed or presented in this instance although vitally relevant and material evidence was readily available for use by trial defense counsel which would have demonstrated the likelihood of petitioner's innocence to these offenses. Thus, this evidence would have fit squarely within the tactical decisions made by trial defense counsel in developing his case and, in fact, provided the basis for his defense and would have conclusively proven the very point which he attempted to do by persuasion alone. In fact, it was the very evidence which counsel should have wanted to introduce and offer. Thus, there is absolutely no issue of trial tactics or decisions. Rather, this entire issue focuses on counsel's failure and refusal to present items of evidence which supported and proved the very points which he expressly argued. Once a tactical decision is made, counsel have the obligation to ensure that the evidence is available for trial. It is submitted that there is no legitimate excuse for this failure to present the very evidence which supported trial defense counsel's argument.

Finally, not only did trial defense counsel fail to present any type of a meaningful defense case on the merits of the case, he also failed to call any witnesses in extenuation or mitigation during the sentencing portion of the court-martial. Apparently, trial defense counsel did not even interview the individuals who knew and worked with petitioner and who could have been potential character witnesses, either on the merits or in sentencing. In her Article 38c, U.C.M.J., submission to the Convening Authority, Captain Powers made this very point, among others, in asserting that petitioner was denied effective assistance of counsel. Letters from a number of individuals who worked with petitioner were attached to the Article 38c, UCMJ submission which give a far more favorable impression of petitioner than the evidence submitted at trial. The letters from Lt. Cosson, TSgt Chadwick, SSgt DelPino and SrA Thomas, which are included in the allied papers, relate petitioner's outstanding performance, trustworthiness and adherence to security regulations to uphold the standards of the Air Force. However, none of this information was presented as evidence at trial despite the fact that these witnesses were available and willing to help. It is submitted that any competent counsel would have interviewed these witnesses who worked with petitioner and were in his chain of command. If this would have been done in the instant case, favorable information would have been discovered and presented at court. Thus, it is apparent that trial defense counsel's actions were deficient not only on the merits of the case, but also during the sentencing hearing as well and corrective action is required and necessary.

While there is no absolute guarantee that petitioner would have been found not guilty, or received a lesser sentence, had trial defense counsel presented the above evidence and aggressively represented his client, it is

submitted that there is a reasonable chance that the outcome at trial may have been materially different. The prosecution's case had a lot of "holes" which could have been effectively attacked such as by presenting evidence of petitioner's inability to move the radios because of his bad back and the availability of funds in his account at all relevant times. If trial defense counsel saw this case as hopeless, he should have aggressively and forcefully advised petitioner of this fact and advised him in the strongest possible terms about the need for sentence protection. *See*, *United States v. Lonetree*, 35 M.J. 396, 413 (C.M.A. 1992). However, this was not done in the instant case. As such, it must be concluded that either trial defense counsel was ineffective in failing to so advise his client or that there really was a legitimate chance of successfully challenging the prosecution's case at trial. Making an opening argument which explains a plausible defense theory, presenting material and available evidence, and to effectively challenge the prosecution's case are all necessary components of a meaningful defense. It is likewise incumbent upon competent counsel to muster mitigating evidence, and to present that evidence during sentencing. As the Court of Appeals for the Armed Forces has stated, it is wholly unreasonable to assume that the outcome would have been the same even if a competent defense had been presented because it rejects "the critical role of counsel in assuring the reliability of the factfinding process". *United States v. Murray*, 42 M.J. 174, 178 (1995).

THE SENTENCE IN THIS CASE WAS SUBSTANTIALLY AFFECTED BY THE PRESENCE OF UNLAWFUL COMMAND INFLUENCE.

On 7 December 1993, petitioner was involved in an incident where he got very frustrated, upset and yelled out in anger. TSgt Gillis witnessed this outburst and did not think anything of it in that it was just a "normal reaction of anger

and frustration" which was not unusual or atypical for that office. Defense Appellate Exhibit E. Although TSgt Gillis did not feel that any disciplinary action was appropriate or warranted for this, he was ordered to write up petitioner for an Article 15. A few days later, petitioner asked TSgt Gillis and several other members of the command to write statements in his behalf. However, these potential witnesses were ordered by Major Werner not to make any statements to assist petitioner about this matter. (Appellate Exhibits XII and XIII; Defense Appellate Exhibit E.)

At trial, the prosecution offered the record of this Article 15 as evidence in aggravation against petitioner (R. 358); Prosecution Exhibit 47. The defense objected to the admission of this evidence on the grounds that petitioner was prevented from fully defending himself and developing and presenting evidence at the Article 15 hearing because of the unlawful order of Major Werner (R. 258). In short, the defense argument was that because unlawful command influence had been exerted in this instance, the government should be precluded from making an affirmative use of this as evidence at a court-martial. The military judge was concerned with litigating what he deemed to be a "collateral matter" and simply allowed the prosecution to use this evidence without any defense attack upon its legitimacy, propriety, or appropriateness (R. 362). In fact, the military judge concluded that the Article 15 was "fairly conducted" despite the illegal nature of the order to potential witnesses not to make any statements in support of petitioner.

It is submitted that this order constituted blatant unlawful command influence in violation of Article 37, U.C.M.J (10 U.S.C. § 837). Command influence has been deemed to be the "mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *United States v. Campos*, 42 M.J. 353, 260 (1995); *United States v. Singleton*,

41 M.J. 200, 202 (C.M.A. 1994); *United States Navy–Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328, 332 (C.M.A. 1988); *United States v. Morris*, 28 M.J. 8, 10 (C.M.A. 1989). The exercise of command influence "tends to deprive servicemembers of their constitutional rights" and if "directed against prospective defense witnesses, it transgresses the accused's right to have access to favorable evidence." *United States v. Thomas, supra*, 22 M.J. at 393–394; U.S. Const. Amend. VI; Article 46, U.C.M.J. (10 U.S.C. § 846). It has expressly been held that "interference with an accused's access to witnesses is a form of unlawful command influence, when done under the mantle of command authority". *United States v. Washington*, 42 M.J. 547, 556 (A.F. Ct. Crim. App. 1995); *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994).

The decision of whether a witness will testify for an accused at a court-martial is that of the witness and counsel for the accused, and the decision must be free of any fear or threat of reprisal by the command. Thus, the "vetting of a witness in an attempt to influence further testimony is improper and has a 'chilling effect on our judicial system.' " *United States v. Tucker*, 20 M.J. 863, 866 (A.F.C.M.R. 1985), *citing*, *United States v. Lowery*, 18 M.J. 695, 696 (A.F.C.M.R. 1984); *United States v. Serino*, 24 M.J. 848, 852 (A.F.C.M.R. 1987); *United States v. Charles*, 15 M.J. 509, 510 (A.F.C.M.R. 1982). It has been held by the Army Court of Criminal Appeals that Article 37 forbids and prohibits coercion or unauthorized influence on actual or prospective witnesses with regard to their testimony. *United States v. Treakle*, 18 M.J. 646, 657 (A.C.M.R. 1984); *United States v. Schroeder*, 17 M.J. 792, 794 (A.C.M.R. 1984). This very rule was blatantly and intentionally violated in the instant case by Major Werner. As such, this was a blatant interference with petitioner's right to defend himself against pending

disciplinary proceedings. Accordingly, this action cannot be sanctioned or condoned in any manner whatsoever by this Honorable Court.

These individuals had information which would have been relevant at the Article 15 proceedings in petitioner's defense, but they were not allowed to convey this information because they were directly ordered not to by Major Werner. As a result of this, petitioner was deprived of material evidence to use in his defense at the Article 15. Since this Article 15 was expressly offered, used and argued by the prosecution at petitioner's court-martial, such facts demonstrate that the sentence announced by the members and approved by the Convening Authority was affected by the presence and use of unlawful command influence. When a witness has been pressured by a military superior not to testify or to alter prospective testimony, they are presumed to have succumbed to that pressure and to have been in fact influenced. *United States v. Carlson*, 21 M.J. 847, 851 (A.C.M.R. 1986); *United States v. Treakle, supra*, 18 M.J. at 658. In fact, this very conclusion was convincingly shown at trial by Appellate Exhibits XII and XIII, without any rebuttal or challenge from the prosecution. Accordingly, it must be concluded that this order was actually given and that it exerted unlawful pressure and influence on TSgt Gillis and Sgt Hunt, as well as other possible witnesses. This fact, coupled with the refusal of each of these individuals to testify at petitioner's court-martial or to even make statements about the information which was available to them, creates a strong inference that petitioner's court was adversely affected.

Because this was an illegal and improper order, it tainted the fairness of the Article 15 process in this instance. As such, it must be deemed unfair as well as improper for the government to affirmatively benefit and make use of this fact in a judicial proceeding. The military justice system simply

does not allow the government to affirmatively benefit from and use actions of unlawful command influence. Since this is exactly what occurred in the instant case, it is submitted that the military judge committed prejudicial error in admitting Prosecution Exhibit 47 into evidence as aggravation during the sentencing hearing.

Not only did this illegal and unlawful order prejudice petitioner at this Article 15 hearing, it is submitted that there was also a residual effect at this court-martial above and beyond the use of the exhibit in aggravation. Defense Appellate Exhibit E is a sworn statement from TSgt Gillis that, because of this order, he "felt under pressure" not to make any statement or to assist petitioner at his court-martial although he would have liked to. He stated that he felt "a lot of pressure from the command not to do anything" to assist petitioner and believed that his pending retirement might be in jeopardy if he took any such action. Accordingly, he did not make a statement or testify for petitioner during the Article 15, the court-martial, or even during any of the post-trial submissions until he retired and was away from the influence of his old unit. Similarly, it is submitted that other potential witnesses were also affected and swayed from supporting petitioner and offering favorable evidence at trial.

As a result of this order, petitioner was deprived of and lost the opportunity to present favorable evidence, not just at his Article 15, but also at his court-martial. Because of this fact, no witnesses were called to testify as to petitioner's character or duty performance although there were at least several individuals who could and would have done so. Thus, the members did not hear a balanced and even representation of petitioner's service, abilities and potential. Rather, it only heard the side which the prosecution wished to portray because of the illegal order not to make any statements or assist petitioner which essentially precluded any contrary

evidence from being presented. Clearly, it must be concluded by this Honorable Court that this order was unlawful and had a very real impact on petitioner's court-martial.

It is an undisputed and well-established principle of military law that when unlawful command influence has been exerted on a court or its participants, the findings and sentence cannot be affirmed unless it is affirmatively proven "beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." *United States v. Thomas, supra*, 22 M.J. at 394; *United States v. Singleton, supra*, 41 M.J. at 202. Such a high burden was not satisfied in the instant case and the sentence cannot properly be affirmed. As a result of the unlawful order of Major Werner and the "pressure" which potential witnesses felt from the command, petitioner was deprived of material and relevant evidence for use in his defense at the court-martial and corrective action is required as a matter of law.

The sentence imposed on petitioner at court and approved by the convening authority was clearly affected and tainted by unlawful command influence. The order given in this instance constituted an act of unlawful command influence which must be deemed to be the "mortal enemy of military justice" and involve a "corruption of the truth-seeking function of the trial process." *United States v. Thomas, supra*, 22 M.J. at 393–394. The facts of the instant case clearly prove that petitioner was deprived of his fundamental rights to a fair trial and equal access to evidence, at least during sentencing. However, the adverse effects of this case go far beyond just petitioner's interest. This case reflects negatively on the military justice system as a whole and the Air Force in particular. It has been stated that the "fundamental policy questions to be answered in command influence cases is whether a reasonable citizen knowing all of the facts of a given case would lose confidence in the military

justice system and believe it unfair." *United States v. Lawson*, 33 M.J. 946, 950 (N.M.C.M.R. 1991); *United States v. Stringer*, 5 U.S.C.M.A. 122, 133, 17 C.M.R. 122, 133 (1954). It is submitted that when this question is answered with regard to the case *sub judice*, the answer is a resounding "Yes", that the public would lose faith in a system that permits such a blatant misuse of authority and unlawful command influence. Accordingly, corrective action is required from this Honorable Court and the sentence must be set aside and a rehearing ordered.

*Conclusion*

For the foregoing reasons, this Honorable Court should reverse the decision of the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces and set aside the findings and sentence in this case. Petitioner respectfully submits the Court of Appeals for the Armed Forces and the Air Force Court of Criminal appeals erred in finding that petitioner did not overcome the presumption of competence of trial defense counsel, and that the sentence in this case was not substantially affected by the presence of unlawful command influence.

WHEREFORE, petitioner requests that this writ be granted.

Respectfully submitted,

DOUGLAS H. KOHRT
Colonel, United States Air Force
Appellate Defense Division
*Counsel of Record*

TISHLYN TAYLOR
Captain, United States Air Force
Appellate Defense Division
*Counsel for the Petitioner*

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
(202) 767-1562

# APPENDICES

# APPENDIX A

UNITED STATES, Appellee

v.

Michael R. LORENZEN, Staff Sergeant
U.S. Air Force, Appellant

No. 96–1036
Crim. App. No. 31292

United States Court of Appeals for
the Armed Forces

Argued February 6, 1997
Decided September 3, 1997

*Counsel*

For Appellant: *William J. Holmes* (argued); *Captain Michael L. McIntyre* (on brief).

For Appellee: *Lieutenant Colonel Michael J. Breslin* (argued); *Colonel Theodore J. Fink* (on brief); *Major LeEllen Coacher*.

Military Judge: Michael B. McShane
Tried at Malstrom Air Force Base, Montana

*Opinion of the Court*

CRAWFORD, Judge:

Appellant was charged at a general court-martial with six specifications of larceny of the following military property:

1. Two General Electric base-station radios.

2. A master key to Building 500.

3. Four extreme cold weather sleeping bags.

4. Two MCU/2P gas masks.

5. Two General Electric camcorders, two Solidex tripods, and two General Electric AC adapters belonging to the University of Montana.

6. An Acer central processing unit, monitor, and keyboard. (Specifications 5 and 6 were combined.)

By exceptions and substitutions, he was convicted of all the larceny offenses, in violation of Article 121, Uniform Code of Military Justice, 10 USC § 921, except stealing the master key to Building 500, the Acer central processing unit, and one Solidex tripod. He was also convicted of four specifications of writing bad checks, in violation of Article 123a, UCMJ, 10 USC § 923a. On April 7, 1994, appellant received a bad-conduct discharge, confinement and forfeiture of $330 pay per month for 5 years, and reduction to pay grade E–1. The Court of Criminal Appeals affirmed the findings and the sentence in an unpublished opinion.

We granted review of the following issues:

I

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL DEFENSE COUNSEL DID NOT ACT AS A DILIGENT AND CONSCIENTIOUS

ADVOCATE ON BEHALF OF APPELLANT BY FAILING TO ACTIVELY AND EFFECTIVELY CHALLENGE AND CONTEST THE PROSECUTION'S CASE AND EVIDENCE, HIS FAILURE TO MAKE NECESSARY AND REQUIRED STATEMENTS, MOTIONS, AND OBJECTIONS, AND HIS FAILURE TO CROSS-EXAMINE WITNESSES AND TO PRESENT ANY DEFENSE WHEN RELEVANT AND MATERIAL EVIDENCE WAS READILY AVAILABLE.

II

WHETHER THE SENTENCE CANNOT BE AFFIRMED BY THIS HONORABLE COURT BECAUSE IT WAS SUBSTANTIALLY AFFECTED BY UNLAWFUL COMMAND INFLUENCE WHICH DEPRIVED APPELLANT OF VITAL AND FAVORABLE EVIDENCE FROM WITNESSES WHO HAD BEEN BLATANTLY ORDERED NOT TO MAKE STATEMENTS ON BEHALF OF APPELLANT.

III

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS COMMITTED PREJUDICIAL ERROR BY ADMITTING AND EXPRESSLY USING AN AFFIDAVIT SUBMITTED BY TRIAL DEFENSE COUNSEL WHICH WAS INADMISSIBLE BECAUSE IT DISCLOSED PRIVILEGED AND CONFIDENTIAL COMMUNICATIONS AND CONSTITUTED AN ILLEGAL AND

UNETHICAL BREACH OF DEFENSE COUNSEL'S CONTINUING LOYALTY TO HIS CLIENT.

We hold that the presumption of competence of trial defense counsel has not been overcome and that the Government rebutted the presumption of prejudice arising from any unlawful command influence in the proceedings under Article 15, UCMJ, 10 USC § 815. For the reasons set forth below, we conclude that the granted issues are without merit.

FACTS

Appellant's downfall began when he saw an acquaintance, Mr. Jody T. Cross, a retired servicemember, at a junkyard. Appellant and Cross discussed electronic equipment, and appellant informed Cross that he had some General Electric base-station type radios which Cross might be interested in purchasing from him. Appellant indicated that he purchased the base-station radios from salvage. Appellant later took those base-station radios to Cross' home, and the two discussed Cross' either buying them or finding someone to buy them.

Unfortunately for appellant, Cross closely examined the base-station radios that evening and, because they had not been de-militarized, suspected appellant was trying to sell stolen government property. The next day, he contacted the Air Force Office of Special Investigations (OSI) about his suspicions. Cross agreed to become a government informant and continue his dealings with appellant. While wearing a tape recording device, Cross had three extensive conversations with appellant about the base-station radios and sleeping bags.

The first recorded conversation involved Cross' speaking with appellant on the telephone. The two set up a time to meet

and purchase sleeping bags and discussed selling the base-station radios for "four bills" or $4,000. During that conversation, Cross complained that he believed he sprained his back lifting the base-station radios. Appellant responded, "Because you are a wimp I guess. I loaded them and unloaded them twice." Appellant also bragged that he had "brand new" sleeping bags to sell.

In the second tape-recorded conversation, Cross visited appellant at his home. At that time, Cross procured two military sleeping bags from appellant in a trade. The sleeping bags were "brand new and in their original wrappers." Cross knew that they were military-type sleeping bags because they were green and had federal stock numbers attached to them. At that meeting, appellant also discussed Cross' commission for selling the base-station radios and the missing doors to one of the radios.

During the final tape-recorded conversation, OSI agents also videotaped the transaction. Appellant and Cross met at a designated place so that Cross could pay appellant the $4,000 minus Cross' $500 commission. After Cross handed the money to appellant, OSI agents apprehended appellant.

After his arrest, appellant consented to a search of his residence. OSI agents seized a key to Building 500, a checkbook, four sleeping bags, two MCU/2P gas masks, an Acer central processing unit, a monitor, keyboard, and some video equipment. The video equipment had the words "University of Montana" etched onto it. OSI identified the video equipment as property missing from the University of Montana's Education Center, which was located at Malmstrom Air Force Base. The equipment had disappeared from the Education Center in 1991.

At trial, OSI Special Agent (SA) Shearer testified that he obtained a copy of the investigation of the missing video

equipment and learned that appellant had informed agents he was alone in the building during the time frame in which the equipment had disappeared. SA Shearer also testified that the report pointed out that appellant had access to the room where the equipment had been.

At trial, the Chief of the Defense Reutilization and Marketing Office (DRMO) testified that the office's records did not indicate appellant had bought any General Electric Master II base-station radios from DRMO. He also testified that DRMO had never sold new military-issue sleeping bags or MCU/2 gas masks. There was further testimony that the type of gas masks and sleeping bags found at appellant's residence would only be given to DRMO if they were "totally unserviceable." There was also testimony that appellant had never been issued a gas mask or sleeping bag.

As for the bad-check charges, in July of 1993 appellant had closed the account on which the bad checks were written. The bad checks were written in December of 1993. Major Torchia, a member on the panel, submitted a question asking whether appellant had another checking account when the bad checks were written and how much money was in that account. The Members Services Supervisor, Lois K. Tinney, testified that appellant did have another account, but she did not know how much money was in that account. She also testified that the bank would not have automatically taken the money from the other account. The bank sent appellant three notices regarding his bad checks. Appellant paid the checks the day after he was read the charges against him (February 17, 1994), approximately a month and a half after he wrote the checks.

During sentencing, the prosecution introduced two counseling letters, two letters of reprimand, an Article 15, and efficiency reports which were not spectacular.

## DISCUSSION

### Issue I—Ineffective Assistance of Counsel

Appellant alleges that he was prejudiced by the ineffectiveness of his trial defense counsel, Captain (Caps) D. Appellant's grievances against his trial defense counsel are numerous. We address appellant's more substantive ineffectiveness claims, namely, that trial defense counsel made no opening statement, failed to make necessary motions and objections, and did not present crucial defense evidence.

As we stated in *United States v. Christy*, 46 MJ 47, 49 (1997): "The Sixth Amendment guarantees a criminal defendant 'Assistance of Counsel for his defense.'" This Court has unanimously applied the test for ineffective assistance of counsel established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Ingham*, 42 MJ 218, 223 (1995).

*Strickland* uses a two-prong test to determine whether appellant had ineffective assistance of counsel. The first prong is whether counsel's conduct was "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. There is a strong presumption that counsel has provided "adequate assistance." *Id.* at 690. The second prong is whether there was prejudice to the defendant. *Id.* at 692. A defendant who alleges prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

To prove that a trial defense counsel's performance was "below an objective standard of reasonableness," appellant must prove that "the 'acts or omissions' on counsel's part 'were outside the wide range of professionally competent assistance.'" *Ingham*, 42 MJ at 223, quoting *Strickland*, 466 U.S. at 690. In other words, this Court must be convinced that

"counsel's performance was one of 'serious incompetency.' " 42 MJ at 224, quoting *United States v. DiCupe*, 21 MJ 440, 442 (CMA 1986)). "The test of counsel's performance is not that he lost; and it is not that some number of options were not pursued or could have been pursued differently—without regard to the degree of utility or the potential hazard of each." 42 MJ at 229.

"Opening statements are a 'critical part of the trial. ... It is during the opening statement that the parties set forth their theory and theme of the case.'" *United States v. Christy*, 46 MJ at 50, quoting *United States v. Turner*, 39 MJ 259, 265 (CMA 1994) (Crawford, J., concurring in the result). However, "unexpected events at trial may lead to changed circumstances or different trial tactics." 46 MJ at 50.

In a sworn affidavit, Capt D explained that he reserved his opening statement for the beginning of the defense case. Just prior to that time, however, appellant unexpectedly informed Capt D that he had decided not to testify. Capt D waived his opening statement because he "would have no testimony from [appellant] which would attempt to explain" appellant's actions or the evidence.

Although we recognize the importance of an opening statement, we also acknowledge that there may be situations in which an opening statement has little value. Whether to testify was appellant's decision. However, trial defense counsel was not ineffective when he failed to make an opening statement because his trial strategy depended upon appellant's testimony. The defense planned to offer no other evidence, and appellant's decision not to testify came unexpectedly just before the beginning of the defense case.

Appellant further alleges that trial defense counsel failed to make various motions and objections. For example, appellant alleges that trial defense counsel failed to object to

43 prosecution exhibits which were inadmissible. Unfortunately, appellant fails to tell this Court specifically why each of these exhibits was inadmissible and why trial defense counsel should have objected to them. Appellant also argues that trial defense counsel should have filed a motion for a Bill of Particulars to find out when and from where the allegedly stolen property was taken and who was responsible for that property. Generally, a Bill of Particulars requests detailed information regarding the charges against appellant. RCM 906(b)(5), Manual for Courts-Martial, United States (1995 ed.). In this case, the Article 32, UCMJ, 10 USC § 832, investigating officer's report provided additional factual details about the charges against appellant and was presumably turned over or made available to the defense under RCM 701(a). *Cf. United States v. Williams*, 40 MJ 379 (CMA 1994). Appellant has not demonstrated what information or advantage would have been derived from a Bill of Particulars that was not already provided by the Article 32 investigating officer's report.

According to appellant, trial defense counsel also should have moved to dismiss the charges against appellant for the theft of the sleeping bags and the gas masks because the Government failed to show that these items were military property. However, at trial there was testimony that the gas masks were new, of the "latest generation," and would not have been "turned in to salvage" or to the DRMO. In one of appellant's tape-recorded conversations with Cross, appellant stated that he had "brand new" sleeping bags. Witnesses also testified that DRMO never sold new military-issue sleeping bags or gas masks, and that the gas masks were the type used by the Air Force. Finally, there was testimony that appellant had not been issued either the sleeping bags or the gas masks in controversy. In light of this evidence, there is no reason to believe that the military judge would have granted a motion to

dismiss. Thus, there is no reason to hold that trial defense counsel was ineffective for failing to make such a motion.

Trial defense counsel also allegedly failed to present crucial evidence (1) that appellant had sufficient funds in his other checking account to cover the bad checks which he wrote on his closed account; (2) that the military was not missing gas masks which were among the items that appellant was accused of stealing; (3) that appellant had a back injury and would have been unable to lift and, thus, steal the 100-pound base-station radios; and (4) that appellant had a receipt showing that a 2-pound base radio was sold by appellant to the informant, Mr. Cross, rather than the stolen 100-pound radios.

Appellant was charged with stealing, among other things, two government-owned gas masks and four government-owned sleeping bags sometime between 1990 and 1994. Appellant submits an unsworn letter from Richard Chadwick who states that an inventory for the 91st and 97th Air Refueling Squadrons showed no items, including gas masks and sleeping bags, were missing. Mr. Chadwick's letter fails to note the date of the inventory. Appellant argues that trial defense counsel was ineffective because he failed to present this inventory.

Trial defense counsel denies any knowledge of the so-called inventory. Appellate government counsel persuasively argued that there was no evidence the property came from those squadrons; there were other squadrons on base which had similar equipment; and any inventory would have to cover all the times between 1990 and 1994. We agree. Appellant has not made a showing that there was a comprehensive inventory available to trial defense counsel. Further, the Government established that the sleeping bags and gas masks were new military property and not something which appellant could have bought used. The charges against

appellant do not allege that the gas masks and sleeping bags came from a particular squadron or even a particular base. Thus, trial defense counsel's failure to offer an inventory showing that no gas masks and sleeping bags were missing was not conduct "below an objective standard of reasonableness."

Appellant wrote checks from a checking account that he had closed. He had a second checking account solely in his name. At trial, defense counsel did not present bank records which would have shown that appellant had sufficient funds in his second checking account to cover the bad checks. Appellant argues that such evidence would have supported the defense's theory of mistake. Appellant also notes that a member asked a witness, who was a bank employee, whether appellant had enough money in the second account to cover the bad checks.

Trial defense counsel's affidavit does not address this issue. We agree with appellate government counsel that evidence appellant had the ability to pay the bad checks could have harmed appellant because, despite various notices, appellant did not actually pay the bad checks for almost 2 months. Thus, we conclude that trial defense counsel was not ineffective for failing to present evidence that appellant had money in a second checking account to pay his debts.

Trial defense counsel did not submit evidence of appellant's bad back because the prosecution had a tape-recorded conversation in which appellant discussed the weight of the base-station radios and called the informant a "wimp" for not being able to lift them. Trial defense counsel also had no need to submit receipts showing that appellant purchased a 2-pound base-station radio because the prosecution brought out on direct and defense counsel on cross-examination information that the radios may have been purchased from DRMO, and the members were unlikely to

believe that the 2-pound radios were the ones appellant sold to Cross in light of their taped conversation regarding the weight of the radios.

Thus, we hold that appellant has not overcome the presumption of competence envisioned in *Strickland*, 466 U.S. at 690.

Issue II—Command Influence

On December 20, 1993, appellant was given Article 15 nonjudicial punishment for orally communicating indecent language to other non-commissioned officers, including Technical Sergeant (TSgt) Gerald R. Gilles. It is this Article 15 for the offense on December 7, 1993, that resulted in a battle of affidavits.

In an affidavit prepared 14 months after appellant's trial, TSgt Gilles said that, on December 7, 1993, a number of excess orders came into their office. In attempting to organize these, appellant became

> frustrated and yelled out in anger. I heard his response and witnessed his behavior and did not think anything of it because it was just a normal reaction of anger and frustration. It was not unusual or atypical for our office and I really did not think much about it.... However, I was ordered by Major Werner to write a statement concerning this incident and was forced to write up TSgt Lorenzen for an Article 15 for this outburst.
>
> On 12 December 1993, TSgt Lorenzen asked me and Sgt Hunt to write a statement in support of his defense of this Article 15. However, I was ordered by Maj Werner not to do so and not to make any statements about this case unless directed to do so by either the commander or Lt Oliver.

> Accordingly, I obeyed these orders and was unable to help TSgt Lorenzen.
>
> I believe that it was unfair for me to be ordered to make a statement against him and to bring an Article 15 against my professional judgment, and then to also be ordered not to tell the truth in a statement in support of TSgt Lorenzen. TSgt Lorenzen simply did not get a fair shake from the command on concerning [sic] this Article 15 or his subsequent court-martial.
>
> Although I was never directly ordered not to make a statement or to assist TSgt Lorenzen at his court-martial, I felt under pressure not to do so because of what had happened shortly before in the Article 15.... Captain [D], Mike's defense attorney, never interviewed me or anyone else in the office to my knowledge. I would have been a character witness or written a statement on his behalf if I did not feel the pressure from the unit not to do so, or if I had been interviewed and asked by his defense counsel.

In response, Major Dale R. Werner, in an affidavit dated January 29, 1996, stated:

> During [December 1993], the squadron commander was pursuing Article 15 action on AB [Airman Basic] Lorenzen for using vulgar language and being insubordinate to a superior. TSgt Gilles reported to me that Airman Lorenzen entered his office, slammed the door and demanded that he and other coworkers, in his duty section, write statements to support his views and claims, involving this case. I told Gilles that no one was required to write statements at this time, if they chose not too [sic]. However, I informed him, the

> Area Defense Council [sic] may require statements however the request would come through the commander and myself.

Appellant argues that undue command influence affected both the Article 15, which was admitted at trial, and the trial itself.

We have long held that "[u]nlawful command influence undermines the integrity of the military justice system as well as of the commanders who are responsible for discipline within their units." *United States v. Weasler*, 43 MJ 15, 16 (1995). To raise the issue of unlawful command influence, "an appellant must (1) 'allege[ ] sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness." *United States v. Stombaugh*, 40 MJ 208, 213 (CMA 1994), quoting *United States v. Levite*, 25 MJ 334, 341 (CMA 1987)(Cox, J., concurring).

The Court of Criminal Appeals reasoned that, when the alleged unlawful command influence occurred with respect to the Article 15, "appellant was free, at that juncture, to decline the Article 15 and to demand trial by court-martial, at which his complaint could have been fully explored and factual disputes resolved. He elected not to do so." Unpub. op. at 5. We disagree with the court below if it means that an Article 15 may not be contested as to guilt or innocence. Appellant did not waive his unlawful-command-influence claim by electing Article 15 nonjudicial punishment rather than demanding trial.

However, assuming *arguendo* that there was unlawful command influence at appellant's Article 15, appellant has not shown that his trial was unfair. The Article 15 was for vulgar language and insubordination. Appellant was on trial for

larceny and writing bad checks. The Article 15 was admitted, along with two other reprimands and counselings, during sentencing. "[W]e...are satisfied beyond a reasonable doubt that any unlawful command influence...of the...witnesses [in the Article 15 proceeding] did not [carry over to] affect the findings or sentence" in this court-martial. *Stombaugh*, 40 MJ at 214.

Issue III—Admission of Affidavit

On appeal, the Court of Criminal Appeals admitted an affidavit from appellant's trial defense counsel addressing appellant's claim of ineffective assistance of counsel. Appellant argues that, in the affidavit, trial defense counsel disclosed privileged information not reasonably related to the ineffectiveness claim. Specifically, appellant contends that it was unnecessary for trial defense counsel to reveal (1) the content of appellant's expected testimony and (2) that appellant was suspected of other thefts.

When a convicted person claims that defense counsel was ineffective, "the attorney-client privilege is waived,...but only as to matters reasonably related to that claim." *United States v. Dupas*, 14 MJ 28, 30 (CMA 1982)(citations and footnote omitted). "The attorney is not free to volunteer information that does not concern the issue of ineffective assistance of counsel." *Id.* (footnote omitted).

In explaining in his affidavit why he did not object to inadmissible hearsay at trial, trial defense counsel revealed that OSI agents suspected appellant of other thefts. The inadmissible hearsay was testimony that appellant was on base years before when certain property was stolen. Trial defense counsel knew that if he objected to the hearsay, the Government would call the OSI agents who had had appellant under surveillance to testify that they had first-hand

knowledge that appellant was on base during those thefts. It was reasonably necessary for trial defense counsel to provide this explanation in his affidavit in order to explain why he did not object and to counter the ineffectiveness claim.

In arguing the issue of ineffective assistance of counsel, appellant took a "shotgun" approach. That is, appellant pointed to a multitude of alleged errors throughout the trial to support his claim of ineffectiveness. In doing so, appellant challenged trial defense counsel's overall trial strategy. In order to counter this charge of ineffectiveness, it was entirely appropriate for trial defense counsel to reveal the testimony that he expected appellant to provide. This expected testimony explained why trial defense counsel chose certain trial tactics. For example, it explained why trial defense counsel made no opening statement, and it shed light on the reason defense counsel cross-examined some witnesses but not others. Because trial defense counsel's strategy revolved around appellant's expected testimony and appellant in effect attacked that strategy, we hold that the affidavit was reasonably related to the ineffectiveness claim.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges SULLIVAN, GIERKE, and EFFRON concur.

## APPENDIX B

UNITED STATES

v.

Staff Sergeant MICHAEL R. LORENZEN,
FR544–72–9004, United States Air Force

ACM 31292

29 April 1996

Sentence adjudged 7 April 1994 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Michael B. McShane.

Approved sentence: Bad-conduct discharge, confinement for 5 years, forfeiture of $330 pay per month for 5 years, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen, Captain Michael L. McIntyre, Captain Robert E. Watson, and William J. Holmes Esq.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Lieutenant Colonel Michael J. Breslin, and Major Jane M.E. Peterson.

Before

PEARSON, SCHREIER, and MORGAN

Appellate Military Judges

## OPINION OF THE COURT

MORGAN, Judge:

After pleading not-guilty to all charges and specifications, appellant was convicted by a general court-martial consisting of members of the larceny of two Air Force base station radios worth $7,400, larceny of government-issue sleeping bags and gas masks, and larceny of camcorders and other equipment from the University of Montana. He was also convicted of uttering four different $100 checks with the intent to defraud. The court-martial sentenced him to a bad-conduct discharge, confinement for five years, forfeiture of $330 per month for five years, and reduction to airman basic. Appellant complains of ineffective assistance of counsel and that he was prejudiced by command influence. Finding no merit in either contention, we affirm.

Appellant was acquainted with retired Technical Sergeant (TSgt) Cross, a relationship based at least in part on the two men's fondness for electronic communications and computer equipment, and their frequenting of salvage auctions. In November of 1993, appellant told Cross that he had two radios he had purchased at a Defense Recycling Management Office (DRMO) auction some time before. Cross expressed an interest in buying them. Sometime between 17 and 21 November, 1993, two large General Electric base station radios, weighing around 100 pounds each, were stolen from building 1464 at Malmstrom Air Force Base (AFB), to which the appellant had the keys. On Sunday, November 21, unannounced, appellant brought two large, cabinet-sized radios to Cross, offering to sell them to him. Cross offered $400, but appellant wanted more, much more.

Noting the radios appeared to be new, and state of-the-art, Cross became suspicious. Because he worked with a civilian contractor who maintained Malmstrom AFB radios,

he had access to a database listing operational electronic communications equipment being serviced by his company. The next day he checked and discovered that the serial numbers on the two radios dropped off by appellant matched two radios which were listed on the active Air Force inventory. He called the Air Force Office of Special Investigations (AFOSI). That day AFOSI agents came to Cross' residence, confirmed that the radios were those just-stolen from the base, and picked them up.

Cross agreed to cooperate in their investigation, and over the ensuing two months engaged in three conversations with appellant which were tape-recorded. Ultimately, a price of $4,000 was negotiated for the two radios. Appellant accepted the money at a recorded meeting on January 14, 1994, after which he was apprehended. A consensual search of appellant's residence revealed government sleeping bags and gas masks, all in new or near-new condition. In addition, two camcorders and tripods subsequently identified by testimony as belonging to the University of Montana and stolen from the base education office in December of 1992, were found in appellant's quarters.

## I. INEFFECTIVE ASSISTANCE OF COUNSEL

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court annunciated the standards by which claims of ineffective assistance of counsel are to be measured. Simplified, they are that counsel's performance must be so deficient, so unreasonable, and the errors so serious, as to conclude that counsel was not functioning as the "counsel" contemplated by the Sixth Amendment. Second, counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose reset is reliable. *Id.* at 687.

The Court was mindful that such a standard constituted a significant barrier to an appellant wishing to assert ineffective

assistance as an error, and candidly admitted that to be intentionally so, writing:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense.

*Id.* at 690.

The Court of Appeals of the Armed Forces has assiduously applied the guidance of the Supreme Court on this issue, most recently in *United States v. Ingham*, 42 M.J. 218 (1995), *cert. denied*, ___U.S. ___, 116 S. Ct. 745 (1996). There, as here, appellant had complained of a failure to cross–examine certain witnesses as appellant would have liked, failure to call other witnesses, and failure to object to the admissibility of certain evidence. The *Ingham* court, although not furnished the benefit of a *DuBay* (*United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967)) hearing on the issue, nor even an affidavit from the defense counsel, began its analysis by asking whether the trial defense counsel had a reasonable trial strategy—not whether it was the best strategy, nor even a good one, but whether it was *reasonable*.

Appellant charges that his counsel was ineffective, because, *inter alia*, he did not make an opening statement, failed to object to numerous items of government evidence, put on no witnesses, failed to vigorously cross-examine government witnesses, and failed to put on evidence of appellant's back injury which ostensibly would have made it painful for him to steal the radios. The difficulty with these charges is that all of them relate to a trial strategy, and are themselves tactical decisions—decisions which were not

unreasonable given the quality of the government's case and the plausibility, or lack thereof, of appellant's theory of defense. In a post-trial affidavit submitted in response to the allegation of ineffective assistance, trial defense counsel notes that the reason for reserving opening statement was that appellant had insisted on putting himself on the stand and explaining the radio larceny as the product of a misunderstanding. According to appellant's plan, he would testify that the recorded conversations between Cross and him actually concerned a radio he purchased in 1990 from DRMO for $30.00. Subtended within this approach was the idea that Cross, who had been court-martialed in 1987 for larceny, stole the radios himself. For whatever reason, appellant abandoned his plan to testify after hearing the government's case, thus obviating the need for an opening statement. The defense rested without putting on any evidence. Nevertheless, the nucleus of this theory was ably advanced through trial defense counsel's cross-examination of government witnesses and in his argument.

We note as a general rule that the strong presumption of competence afforded counsel means we extend great deference to his judgment. *United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993). We will not second guess tactical decisions which are not patently unreasonable. *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 600 (1993). Trial defense counsel skillfully elicited Cross' conviction and the theory that he might be the thief without having to put appellant on the stand. He also was able to inject a theory of mistake on the fraudulent checks, and to successfully argue that the government had failed in its burden to establish that all the items alleged to have been stolen from the University of Montana had, in fact, been stolen by appellant. Plainly, the court did not buy the defense theory of the larceny of the radios, and for good reason. It was

utterly illogical for Cross, having himself stolen the radios, to have reported those radios the next day to the AFOSI. What's more, the recorded conversations between Cross and appellant leave no doubt that the stolen radios which the AFOSI seized from Cross were the same ones appellant referred to in the conversations. For example, in talking about the price he should be paid, appellant speaks of his research which indicated that the radios were worth $3200.00 each (a startling appreciation given appellant's contention that he had purchased them five years earlier from DRMO for $30.00). In addition, one of the stolen radios was missing its cabinet doors, a fact which figured in a number of the recorded Cross-Lorenzen discussions.

It requires little trial savvy to know that sometimes the prosecution's proof is so strong that it is better to remain mute than to advance insultingly Transparent alibis, perjurious testimony, or evidence which is as likely to harm as it is to help. To do so risks a mendacity instruction and the ire of a jury who not only believes they have been lied to, but worse, may sense the accused thinks them idiots. The Sixth Amendment does not oblige counsel to make a bad situation worse by engaging in counter-productive courtroom theatrics. Accordingly, we reject this assignment of error.

## II. UNLAWFUL COMMAND INFLUENCE

Next, appellant levies a charge of unlawful command influence. He premises this charge on an order allegedly given by one Major Werner (not his commander), to two noncommissioned officers, TSgt Gilles and Sergeant (Sgt) Hunt. According to Gilles and Hunt, Major Werner told them not to give statements in favor of the appellant in connection with Article 15 nonjudicial punishment administered to appellant for using indecent language in their presence. Article 15, Uniform Code of Military Justice (10 U.S.C.

§ 815). According to the post-trial affidavit of TSgt (now retired) Gilles, he was prepared to say that coarse language was commonplace in appellant's shop. This was apparently the thrust of appellant's approach to the action. Indeed, notwithstanding Major Werner's alleged order, appellant forwarded eight different statements from people in his shop in his written presentation to the nonjudicial punishment action. Apparently, he viewed these to be "mitigating," although a sampling of the various statements might well persuade the reader otherwise: "I have noted that Sergeant Lorenzen has a very acid or offensive at times sense of humor;" "Sergeant Lorenzen has a sarcastic attitude that he needs to learn to control;" or "You are however one of the most sarcastic and vocal individuals that I've met...." Appellant and most of the individuals who submitted statements in his behalf seemed to have missed the real point of the action—the outspoken contempt for the chain of command implicit in what appellant had said.

At trial, appellant's defense counsel tried to suppress the Article 15 based upon command influence. The military judge asked what the practical effect of the order had been, given that it related to a previously completed action collateral to the court-martial. He was reluctant to "relitigate" the Article 15 action. So are we. Yet, in a post-trial affidavit, TSgt (ret) Gilles has raised the ante, supplying a possible nexus between the nonjudicial punishment action and the court-martial. This time, he avers Major Werner "ordered [me] not to tell the truth in a statement in support of TSgt Lorenzen." He continues, "Although I was never directly ordered not to make a statement or to assist TSgt Lorenzen at his court-martial, I *felt under pressure not to do so* because of what had happened shortly before in the Article 15." (Emphasis added.)

In yet another post-trial affidavit, Major Werner remembers things quite differently. He denies giving such an

order. In fact, his account of events differs in nearly every respect from Gilles'. According to Major Werner, TSgt Gilles came into him to *complain* that appellant had slammed the door to his office and "demanded" that Gilles and others write statements in his behalf. Major Werner recalls that he did no more than to advise Gilles that he did not have to make a statement if he didn't want to.

Leaving for another day whether Major Werner was a "commander" for purposes of analysis (*see, e.g., United States v. Stombaugh*, 40 M.J. 208, 214–15 (C.M.A. 1994) (Wiss, J., concurring in part and in the result, and Sullivan, C.J., concurring in the result), *cert. denied*, ___U.S. ___, 115 S. Ct. 113 (1995)), we will assume that had Major Werner ordered Gilles not to tell the truth in support of appellant it may well have constituted unlawful command influence *with respect to the nonjudicial punishment action*. But, appellant was free, at that juncture, to decline the Article 15 and to demand trial by court-martial, at which his complaint could have been fully explored and factual disputes resolved. He elected not to do so.

We must take seriously any allegation of command influence, recognizing its corrosive effect on the administration of military justice. *See United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987). But, appellant has failed utterly to convince us that it played any role in his court-martial. Gilles himself states that he would have been willing to testify on appellant's behalf during sentencing. That neither he nor anyone else was called for such testimony is not, however, terribly surprising. Putting appellant's military character on the line in sentencing poised a Damoclean sworn over appellant's head. His Enlisted Performance Reports as far back as 1980 contained pervasive references to appellant's poor attitude, laziness, and insubordination. His personnel records contained the

aforementioned Article 15, a letter of reprimand for insubordination, a vacation of suspended punishment for lying to his first sergeant, two records of counseling for poor duty performance and attitude, and a letter of reprimand for dereliction of duty. There is evidence that appellant's commander, first sergeant, and immediate supervisor thought little of his duty performance or his attitude and would have made devastating rebuttal witnesses to any evidence of good military character. Considering the foregoing, therefore, even assuming (without deciding) that there were some substantive connection between Major Werner's "order" and appellant's court-martial, we are persuaded beyond a reasonable doubt that it did not prejudice his sentencing case.

Finding no merit in appellant's contentions, we find the findings and sentence to be correct in law and fact, the sentence is appropriate, and the same are

AFFIRMED.

Senior Judges PEARSON and SCHREIER concur.

OFFICIAL

ALVIN . STRIBLING
Technical Sergeant, USAF
Chief Court Administrator